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No. 91-281

In The

Supreme Court of the United States

October Term, 1991

CITY OF OKLAHOMA CITY,

Cross-Petitioner,

v.

RAYMON J. MELTON,

Respondent.

Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

CROSS-PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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JAMES G. HAMILL
Municipal Counselor
*DIANE LEWIS
Deputy Municipal Counselor
200 N. Walker, Suite 309
Oklahoma City, OK 73102
(405) 297-2766

Attorneys for Cross-Petitioner City of Oklahoma City

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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CROSS-PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The cross-petitioner, The City of Oklahoma City, respectfully submits this reply in response to new matters raised by respondent, Raymon J. Melton in the statement of the case as well as to matters raised in the respondent's reasons for denying the writ.

NEW MATTERS ADDRESSED IN STATEMENT OF THE CASE

In the Statement of the Case, respondent claims cross-petitioner made certain erroneous statements in the following areas:

(1) The respondent objected to The City's assertion that Raymon J. Melton had

"secretly recorded a conversation with a prosecutor while on duty" and while in the course of Melton's duties as a police officer. (Brief in Opposition at 4, 5, and 6.) In suggesting this as error, respondent noted he was not involved in any way with the prosecution of District Judge William Page, and in fact, was a chief witness for the criminal defense.

(2) Respondent suggests cross-petitioner placed too much significance on the "act of tape recording", when, in fact, defendants in the trial had testified there was nothing improper in making this tape recording. (Brief in Opposition at 5 and 6.)

(3) The respondent claims error when cross-petitioner describes the conversation between Lt. Melton and Assistant U.S. Attorney Wes Fredenburg as "confidential". (Brief in Opposition at 6, 7 and 8.)

A. Melton on Duty When Interviewed

Although there is much discussion both from the respondent and the Court of Appeals for the Tenth Circuit concerning Melton's status at the time of the interview, the evidence submitted and the testimony of respondent clearly show that respondent was "on duty" at the time he secretly taped his interview with Mr. Fredenburg.

Melton testified at the trial:

Q. Then did you proceed to the office of Mr. Fredenburg in the due course of events?

A. I did, on Friday. I don't recall the exact date. It was in May.

Q. Around May 12, 1983?

A. That sounds about right.

Q. And at this time, how did you prepare yourself?

A. I was on duty. Mr. Fredenburg had advised me to be in his office between 3:00 and 3:30 on Friday, that he wanted to talk to me. And I advised him that I would be on duty. He said, that's fine, just come on by and he'd talk to you. I said okay.

I was in uniform. I did have a walkie-talkie, and I was on duty. And my captain knew where I was going to be. (Tr. Vol. 1, 110, 111)

Melton also admitted he was "on duty" in his prefatory comments made in his tape recording. (Tr. Vol. I at 182)

Judge McKay, in announcing the opinion of the panel (Petitioner's Appendix at 55.), opined:

> At least some of the information discussed with the federal prosecutor during the interview was gained in the course of Mr. Melton's duties as a police officer.

Although Judge Page had been indicted on a federal charge and the investigation on that charge was conducted by federal law enforcement, the information Melton had provided Assistant U.S. Attorney Fredenburg in the interview would not have been accessible to him had he not been a police officer.

B. Significance of tape recording by Melton and the view of confidentiality by the Police Department.

The Departmental (Disciplinary) Review Board of the Police Department and former Police Chief Lloyd Gramling determined that Melton's action in surreptitiously recording a private conversation with a federal prosecutor and turning over the recorded tape to Page's defense

counsel was in violation of Section 1.01, of the Oklahoma City Police Code of Ethics, which requires every police officer to keep secret whatever that officer hears or sees of a "confidential nature" unless the "revelation is necessary in the performance of my duty."

The findings of the Board had been submitted to Police Chief Gramling, who subsequently terminated Melton after a disciplinary dismissal had been approved by the City Manager. A portion of the text of Chief Gramling's September 13, 1983 letter to Melton provided:

> In this instance, you had a private meeting with a representative of the U.S. Attorney's Office about the upcoming trial of Judge Page and without the knowledge of the U.S. Attorney, you recorded that conversation. You then furnished this recorded conversation to the defense council (sic) which was used in defending Judge Page on the criminal charges.
>
> The Board feels you were in flagrant violation of our Police Code of Ethics and recommended you be terminated from your employment with this Department. (Plaintiff's Exhibit 54, R. 0143.)

The Departmental (Disciplinary) Review Board, sitting in its adjudicative capacity, found a violation of the Code of Ethics. This finding was explained by Major Marvin Maxwell in his deposition testimony:

> Q. Why did you vote in the fashion that you voted?
>
> A. Well, there's several reasons. I felt that it was sustained that Lt. Melton did violate our Code of Ethics, our code of conduct that he – Lt. Melton, as I say, he had 20, almost 21 years on the police department. He wasn't a rookie officer.
>
> His whole life has been police work. He knows the police department. He knows the

philosophy of the police department. He knows how we act. He –

Q. In that regard, is it improper for Mr. Melton to testify on behalf of the defendant in a criminal trial?

A. No, sir, it is not.

Q. Would that be a violation of his Code of Ethics?

A. No, sir, it would not. (Tr. Vol. IV at 787, lines 12-25)

Q. Improper for Mr. Melton to tell defense counsel the facts that he knows about a case about a pending lawsuit?

A. No, sir.

Q. Would that have been a violation of his Code of Ethics?

A. No, sir.

Q. What in this case was a violation against the police Code of Ethics?

A. I'm sorry.

Q. What did Mr. Melton do that violated the Code of Ethics?

A. He violated a *confidential relationship*, a *confidential conversation* he had with a prosecuting attorney about a criminal case which he was not the investigator in, we all agree, but however it still was a criminal case.

And he was – this discussion was being held as a result of him being a police officer with a prosecutor even though he was not the investigator on the case.

He then *secretly recorded* this *confidential conversation* and gave this information to defense counsel. This type conduct, our credibility, the police department's credibility is established by the relationships we have of the people we work

with, the trust that we have and the people that we work with, the trust that other police agencies have that we will not violate a confidence. The relationship we have with all law enforcement agents in the community, that we do not violate confidences. (Emphasis supplied, Tr. Vol. IV at 788, lines 1-25)

What Melton did, undermined the integrity, the whole integrity of the Oklahoma City Police Department. And that's the reason I voted to fire him.

Q. Was it a violation of that trust if you tell defense counsel only those things that you know?

Let's put it in terms of this case. Is it a violation of confidence between a prosecutor and a police officer for that police officer to tell defense counsel that he knows the defendant?

A. No, sir.

Q. Is it a violation of that trust for him to tell defense counsel that he knows a prosecution witness?

A. No.

Q. Is it a violation of that trust for him to give his opinion as to the truth and veracity of that prosecution witness?

A. No, sir.

Q. In this case was it a violation of the trust between he and the prosecutor for him to tell defense counsel that Richard Riley had told me that he was going to be paying Judge Page's attorneys fees for a long time?

A. No, sir.

Q. That didn't violate the trust.

A. No, sir.

Q. So you didn't fire him for that. (Tr. Vol. IV at 789, lines 1-25)

A. No, sir.

Q. Would it be against his Code of Ethics for a police officer to tell someone that a prosecutor was in violation of the law?

A. Absolutely not.

Q. Would he be required to –

A. He would be required and compelled to do that, any violation of the law.

Q. Could Mr. Melton have done that without revealing his entire conversation or providing the tape?

A. Of course.

Q. Would you have voted to terminate Mr. Melton if it violated his First Amendment rights to terminate him?

A. I'm sorry, sir, I didn't hear you.

Q. Would you have voted to terminate Mr. Melton if it had violated Mr. Melton's First Amendment rights to terminate him: [sic]

A. Of course not. (Tr. Vol. IV at 790, lines 1-17.)

The City of Oklahoma City's representation that the covert recording of a private conversation as "confidential" was based upon the adjudicative findings of the Board in applying § 1.01 of the Police Code of Ethics.[1]

---

[1] The Tenth Circuit panel distinguished between a confidential relationship in the intradepartmental structure and one in the interdepartmental setting in its First Amendment analysis. Cross-petitioner does not agree with this distinction. (Petitioner's Appendix at 66, 67 and 68)

RESPONSE TO REASONS FOR DENYING THE WRIT AS TO NEW MATTER.

Cross-Petitioner Properly Preserved Issue as to First Amendment.

Respondent asserts that prior to the trial " . . . cross-petitioner's [sic] never raised the assertion that either the tape recording was a basis for defeating Plaintiff's First Amendment claims nor that plaintiff's activity were not matters protected by the First Amendment." Further, respondent claims The City merely objected to Instruction No. 5 based upon the balancing test, which he asserts does not properly preserve the First Amendment issue for certiorari. (Brief in Opposition at 10 and 11.)

Counsel for respondent further alleges the jury made a finding that the tape recording was not of a confidential nature and that issue is a question of fact, not law. (Note 12.)

As recited in the Brief in Opposition, The City generally stated among its pretrial order: "Plaintiff's termination was not based on the exercise of his constitutional rights." In response to petitioner's assertions, cross-petitioner contends that the above quoted statement from the pretrial order is adequate to preserve the issue as to any of the amendments to the U.S. Constitution, including the First and Fourteenth. Additionally, The City's counsel cited *Connick* in his objection to Instruction No. 5 which preserves this issue for appeal (Tr. Vol. V at 1002 and 1003.) Furthermore, the Court of Appeals for the Tenth Circuit reviewed errors of law as to Instruction No. 5 (First Amendment Claims of Plaintiff). The Tenth Circuit held that the issue of whether Mr. Melton's speech was constitutionally protected was one of law, not fact, citing *Connick v. Myers*, 461 U.S. 138, 148 (1983). The Tenth

Circuit further determined that this instruction was erroneous, but held it to be harmless.

As part of the analysis of the implication of the First Amendment in a public employment setting, a multi-step process is invoked. The discussion of this analysis is contained in The City's cross-petition for certiorari. (Cross-Petition at 11-23.) The "balancing test" is only one step of the analysis, but the entire process must be reviewed when determining whether a public employee's First Amendment rights have been violated.[2]

The respondent also contends cross-petitioner did not introduce any evidence of actual disruption or potential disruption in the workplace.

The respondent, however, offered the testimony of its expert, Dr. George Kirkham, who stated:

> Q. You don't think there would be any adverse effect of a prosecutor being recorded and his conversation with a police officer being turned over to a third party in the relationship between that prosecutor and the police department?
>
> A. I don't know that I can answer that question. I suppose if a prosecutor learned that a police officer was surreptitiously and without good reason taping his conversation, and, again, without good reason turning it over to defense counsel, yes, there would be very serious consequences. (Tr. Vol. II at 477, lines 16-25)

It appears that Dr. Kirkham recognizes the potential impact of Mr. Melton's actions on the relationship

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[2] Cross-petitioner wishes to correct a typographical error on page 13, paragraph 3 of its Cross-Petition with the inclusion of the word "not" before "the motivating factor."

between the police department and the federal prosecutor.

CONCLUSION

Cross-petitioner contends the questions presented in its cross-petition for writ of certiorari have been preserved and the new matters raised by respondent do not constitute a basis for denying this cross-petition.

Respectfully submitted,

JAMES G. HAMILL
Municipal Counselor
*DIANE LEWIS
Deputy Municipal Counselor
200 N. Walker, Suite 309
Oklahoma City, OK 73102
(405) 297-2766

Attorneys for Cross-Petitioner
City of Oklahoma City

*Counsel of Record